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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITIZENS ELECTRIC CORPORATION,
Petitioner,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES W. ERWIN*
JOHN C. HANNEGAN
CRYSTAL M. KENNEDY
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Petitioner

*Counsel of Record

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

Does a complaint seeking the recovery of response, removal and remedial costs incurred by the United States and the cost of cleaning up a hazardous waste site pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9607(a) constitute a legal claim for money damages or an equitable claim for the return of money expended to restore the property to its former condition?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were the Petitioner, Citizens Electric Corporation and Respondent, United States Fidelity and Guaranty Company. Citizens Electric Corporation has no parent, subsidiary or affiliate corporations to list pursuant to Rule 29.1. United States Fidelity and Guaranty Company has an affiliate known as Fidelity & Guaranty Underwriters, Inc. which has issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Citizens Electric Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on March 20, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported. It is reprinted in the Appendix, p. A-1.

The memorandum opinion of the United States District Court for the Eastern District of Missouri, Eastern Division (Jean C.

Hamilton, District Judge) has not been reported. It is reprinted in the Appendix at p. A-4.

JURISDICTION

The Respondent brought this action in the United States Court for the Eastern District of Missouri, Eastern Division invoking jurisdiction under 28 U.S.C. §1332. On June 28, 1991, the District Court rendered judgment in favor of the Respondent. *See* App. D, p. A-12. Pursuant to 28 U.S.C. §1291, Petitioner appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment on March 20, 1991. *See* App. A. p. A-1, App. B. p. A-3. Petitioner sought a rehearing and rehearing *en banc*, both of which were denied on May 7, 1992. *See* App. E., p. A-13.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C. §9607(a), Comprehensive Environmental Response, Compensation and Liability Act of 1980:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . at any facility . . . shall be liable for —
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan;
> >
> > (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

STATEMENT OF THE CASE

Between 1953 and 1976 Petitioner Citizens Electric Corporation sent electrical equipment to Missouri Electric Works in Cape Girardeau, Missouri for repair or resale. The equipment included transformers which contained oil contaminated with polychlorinated biphenyls ("PCB"). The PCBs allegedly leaked or spilled from the transformers, resulting in soil and groundwater contamination at the site.

On June 30, 1987, the United States Environmental Protection Agency notified Citizens Electric that it was a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601 *et seq.* ("CERCLA") as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), P.L. No. 99-499, 100 Stat. 1613, who could be liable for the response and clean up costs at the site, including the costs of removal, remediation, oversight and investigation. The EPA notice suggested that Citizens Electric and forty other named PRPs form a committee to represent their common interests, to perform remedial action and to negotiate with the EPA. The EPA also offered Citizens Electric and the other PRPs the option to perform the remedial investigation/feasibility study ("RI/FS") under the Government's supervision pursuant to CERCLA §104(a).

From January 1968 through November 1972 and from November 1973 to November 1983, Citizens Electric was insured under standard form policies of comprehensive general liability insurance ("CGL") issued by Respondent United States Fidelity and Guaranty Company. Citizens Electric was also the insured

under excess policies of liability insurance issued by USF&G from October 1969 to November 1983.[1]

On January 25, 1988, Citizens Electric notified USF&G of the EPA claim with respect to the site. USF&G initially reserved its rights and, on December 7, 1989, denied all coverage for "all government required or mandated investigation and clean-up expenses, including the claim(s) of the EPA or any potential contribution rights that have been or may be asserted by other PRPs involved at the MEW site."

On December 30, 1988, the EPA issued an Administrative Order on Consent pursuant to CERCLA §106 which required Citizens Electric and other PRPs to conduct a remedial investigation into the extent of PCB contamination and to undertake a

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[1] The insuring clause in each of the primary CGL policies provides:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage. . . .

App. C. at p. A-6.

The insuring clause in the excess insurance polices from 1969 to 1981 provided:

> The Company will indemnify the Insured for all sums which the Insured shall become obligated to pay as damages and expenses . . . by reason of liability imposed upon the insured by law . . . because of property damage.

App. C. at p. A-8.

After 1981, the coverage provision in the excess policies read as follows:

> The Company will indemnify the Insured for all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage.

App. C. at p. A-8.

feasibility study to determine appropriate remedial measures. The Administrative Order also directed the PRPs to pay the EPA's oversight costs with respect to the RI/FS.

Citizens Electric paid its share of the RI/FS costs to the Missouri Electric Works Steering Committee, a group of PRPs formed to respond to the EPA action. The study results confirmed that PCB contamination existed in the soil and groundwater at the site. In September 1990, the EPA issued its Record of Decision pursuant to CERCLA §113(k). The EPA determined that the PCB-contaminated soil should be excavated and thermally destroyed. The ground water was to be cleaned up by extracting the contaminated water and treating it by air-stripping following by vapor phase carbon adsorption. The estimated cost of these remedial and cleanup actions was, at the time of trial, $8,400,000.00 and $730,000.00, respectively.[2]

On February 27, 1990, USF&G filed a complaint in the United States District Court for the Eastern District of Missouri, Eastern Division, seeking a declaratory judgment that it had no obligation under its CGL or excess insurance policies to pay any part of the liability of Citizens Electric for the costs of response, removal, remediation or cleanup at the site, or to provide a defense to Citizens Electric for any such claims. Citizens Electric counterclaimed for a declaratory judgment seeking a declaration that such coverage obligation existed and for breach of contract for USF&G's failure to defend and indemnify in accordance with the terms of the policies.

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[2] After the decision by the District Court, it was discovered that the contamination was worse than originally thought. The estimated cost for cleanup of the soil and groundwater is now $15,304,000 and $21,500,000 respectively. The EPA response costs incurred to date are $1,112,000. The estimated future EPA response costs are $3,891,000 for the soil cleanup and $1,251,000 for the groundwater cleanup. The total amount paid to date by the PRPs for the Steering Committee's expenses are $1,510,000. The PRPs are thus liable for a total of approximately $45,000,000 with respect to this site.

The matter was submitted to the District Court on stipulated facts. App. C. at A-4. The District Court entered judgment in favor of USF&G. App. D. at A-12. In its Memorandum Opinion, the District Court noted that the Eighth Circuit in a divided and controversial opinion had decided in *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied, sub. nom. Missouri v. Continental Ins. Cos.*, 488 U.S. 821 (1988) ("*NEPACCO*") that, under its interpretation of Missouri law, the insurance policies covered only damages for which the insured may be liable in actions at law. App. C. at A-9. There was no coverage for the costs of response, removal, remediation and cleanup because these claims against Citizens Electric were deemed to be "equitable" rather than "legal." 842 F.2d at 985-987. While the District Court found the reasoning in the dissent in *NEPACCO*, rather than the majority, to be "consistent with the principles of construction of insurance contract terms under Missouri law," it believed itself "constrained solely by reason of *stare decisis* to follow the majority opinion." App. C. at A-11.

On appeal, a panel of the Eighth Circuit affirmed the judgment of the District Court, holding that it too must follow *NEPACCO* until it was overruled by the Court *en banc*. App. A. at A-2. Citizens Electric petitioned for a rehearing *en banc*, asking the full Eighth Circuit to reconsider the continued vitality of *NEPACCO* in light of a conflicting decision of the District of Columbia Circuit in *Independent Petrochemical Corp. v. Aetna Cas. & Surety Co.*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1777 (1992) holding that *NEPACCO* clearly misread Missouri law and in light of this Court's decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), characterizing response, removal, remediation and cleanup costs as "money damages." On May 7, 1992, the Eighth Circuit declined to hear

the case *en banc*, with four judges dissenting. The Eighth Circuit also denied Citizens Electric's petition for rehearing.[3] App. D. at A-13.

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[3] The United States and the State of Missouri filed complaints on June 29 and July 13, 1992, respectively, against Citizens Electric and the other PRPs seeking implementation of the remedial action in the EPA's Record of Decision, reimbursement of all response costs incurred by them to date, and a declaration that the PRPs are liable for all costs of future actions of response, removal, remediation and cleanup. *United States v. Union Electric Company, et al.*, No. 1:92CV-0078 (E.D. Mo., June 29, 1992); *State of Missouri v. Union Electric Company, et al.*, No. 1:92CV-0088 (E.D. Mo., June 29, 1992). Concurrently with the filing of the Complaints, Consent Decrees were lodged with the Court for the purpose of giving the public notice and an opportunity to provide comments. The Consent Decrees, if entered, will require the PRPs to pay the response, remedial, removal and clean up costs incurred to date and to make additional payments into a trust fund, which will be used to pay the future costs of cleaning up the site. Citizens Electric's share of the total cost is estimated to be $4,767,000.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT'S DECISION THAT CERCLA COST RECOVERY ACTIONS ARE "EQUITABLE" RATHER THAN "LEGAL" CONFLICTS WITH A PRIOR DECISION OF THIS COURT THAT SUCH ACTIONS SEEK RELIEF IN THE NATURE OF "MONEY DAMAGES"

A. A Decision By This Court As To Whether CERCLA Cost Recovery Actions Are "Legal" Or "Equitable" Would Be Of Nationwide Significance Because The Nature Of The Claim Against An Insured Under Comprehensive General Liability Insurance Policies Is The Fundamental Threshold Issue In Coverage Disputes Over Environmental Clean Up Costs

The fundamental threshold question in every insurance coverage case is the nature of the claim against the insured. In its Opinion below, the Eighth Circuit reaffirmed its prior holding in *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.) (en banc) *cert. denied sub. nom. Missouri v. Continental Ins. Co.*, 488 U.S. 821 (1988) ("*NEPACCO*") that an action for recovery of response, remedial, removal and cleanup costs under §107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607(a), is a claim for "equitable damages" because it seeks restitution of money spent by governmental agencies or private parties upon restoring a hazardous waste site to its former condition.

The Eighth Circuit's holding ignores this Court's subsequent decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) where the Court characterized a claim for recovery of response costs under CERCLA as one for "money damages" no less than twenty-one times. Of course, a claim for "money damages" is

the hallmark of a legal, as opposed to equitable, action. Moreover, the Eighth Circuit's analysis depends upon an historically inaccurate view of restitution, which is as much a legal as an equitable remedy, having originated as a variant of the common law action of assumpsit in the law courts of 17th Century England.

The nature of a response cost recovery action under CERCLA is of national significance because it can be determinative of the question of coverage for such costs under the standard form Comprehensive General Liability ("CGL") insurance policies issued by insurance companies prior to 1986. The issue of whether CERCLA response costs are covered under the insuring provisions of CGL policies has been litigated in numerous cases in both the state and federal courts, which have reached conflicting decisions under state law despite the presence of identical policy language.

The root of the conflict can be traced to the ancient division between law and equity. Those courts ruling in favor of the insurance companies hold that the CGL coverage for "damages" the insured is "legally obligated to pay" refers only to actions at law. Those courts ruling in favor of the insured hold that the term "damages" includes response costs or that the term is ambiguous and therefore should be construed to include all forms of civil liability, except fines or penalties.

It is apparent that this divergence of opinions construing the same words in a standard form insurance policy arises from the premise that the money judgments sought in CERCLA §107(a) actions constitute "equitable" rather than "legal" relief. If, as Petitioner contends, such actions seek money damages constituting legal relief, then there is coverage under the CGL policies regardless of how one construes the term "damages."

A decision by this Court authoritatively answering the question of whether such claims are "legal" or "equitable" will help

to bring uniformity and rationality to what is now a crazy quilt patchwork of coverage decisions. By providing insureds and insurers with a definitive interpretation of the nature of a response cost recovery action under §107(a), the Court can materially reduce the transaction costs associated with Superfund sites by reducing the amount of litigation over whether insurance coverage exists. Thus, potentially responsible parties and (where there exists insurance coverage) insurers may concentrate their financial resources on actual cleanup efforts, rather than upon whether insurers have any legal liability to pay for the costs of such cleanups.

B. The Underlying Premise Of The Decision Below That CERCLA Cost Recovery Actions Are "Equitable" Rather Than "Legal" Conflicts With *Pennsylvania v. Union Gas Company* Which Held That Such Actions Are For Money Damages And It Incorrectly Assumed That Actions For Restitution Seeking Money Judgments Were Not Actions Cognizable In The Law Courts Of England

The standard form CGL insurance policy prior to 1986 provided that the insurance company would provide a defense and pay for sums which the insured "shall be legally obligated to pay as damages" because of property damage.[4] Litigation in this area has primarily been over the state law question of whether the money sought by governments in cost recovery actions constituted "damages" as defined in the policy.[5] However, a funda-

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[4] The new standard form CGL policy (now known as Commercial General Liability policies) attempts to exclude unequivocally all liability for cleanups of hazardous waste sites. *See* D. Davis, "Insured Versus Insurers: Litigating Comprehensive General Liability Coverage in the CERCLA Arena — A Losing Battle For Both Sides," 43 *Southwestern L.J.* 969, 971 *n.* 13. (1990).

[5] *See, e.g., Aetna Casualty and Surety Co. v. Pintlar Corp.*, 948 F.2d 1507, 1511-1512 (9th Cir. 1991) where the leading cases are collected.

mental underlying theme of each of these cases is the nature of the cost recovery action. Many courts, such as the Eighth Circuit, have held that cost recovery actions are "equitable" rather than "legal" because the government is seeking restitution of money spent by it when cleaning up a hazardous waste site.[6]

The decision in *NEPACCO* is typical of these cases. After reviewing the state law principles of construction of insurance contracts, the *NEPACCO* majority concluded that the term "damages" as it appears in the CGL policy would be ambiguous from the viewpoint of a lay insured. However, *NEPACCO* held that the Missouri Supreme Court would, if ever presented with the question, hold that the term "damages" is not ambiguous in

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[6] The legal-equitable distinction in §107(a) actions has received the most attention in the context of a PRP's demand for a jury trial, where the division between law and equity is also decisive. *See, e.g., Tull v. United States*, 481 U.S. 412, 417-418 (1987). Most courts have devoted little in-depth analysis to the issue, satisfying themselves with the conclusion that §107 seeks relief for the cost of restoring the property to the former condition, a form of restitution. *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Reilly Tar & Chemical Corp.*, 20 Env't Rep. Cas. 1052 (D. Minn. 1983). They contrast restoration of the property with the payment of compensation for property damage without recognizing that the relief is identical in many cases. *See, e.g., In re Acushnet River & New Bedford Harbor*, 712 F.Supp. 994, 1001-1004 (D. Mass. 1989) (analyzing state law claims for cost of cleaning up public nuisance). Moreover, the conclusion of the lower courts that a restitutionary remedy consisting of the payment of a money judgment was equitable relief available only in the the chancery courts of England is simply wrong. 1 George E. Palmer, *Law of Restitution* §1.2.

the insurance context and that it would refer only to "legal damages."[7]

The Court then turned to the federal issue of the nature of an action for recovery of response and cleanup costs under §107(a) of CERCLA. While recognizing that there existed a common law action for damages to real property, one of whose measures could be the cost of restoring the property to its original condition, the *NEPACCO* majority noted that it was the type of relief sought under §107(a) that was important in determining coverage. Even though the plaintiff in a cost recovery action under §107(a) sought money, the court held that such lawsuits "are essentially equitable actions for monetary relief in the form of restitution or reimbursement of costs." 842 F.2d at 987. Accordingly, the *NEPACCO* majority held that there was no coverage for federal and state government claims for cleanup costs under CERCLA §107(a) as a matter of state law because the nature of the federal action under that statute was equitable rather than legal.[8]

[7] The District of Columbia Circuit held that the Eighth Circuit clearly misread Missouri law by construing the policy language from the viewpoint of an insurance specialist rather than a lay person. *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 944 F.2d 940, 945-946 (D.C. Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1777 (1992). *Cf. Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210-211 (Mo. banc 1992) [ambiguous insurance contract construed from viewpoint of lay insured because " 'Insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion,' " quoting *Gaunt v. John Hancock Mutual Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947)].

[8] Some courts have distinguished between cost recovery actions under §107(a)(4)(A), (B) and natural resource damage actions under §107(a)(4)(C). *Compare Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986) with *Ohio v. Department of Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989). In *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986) the Court held that Congress intended the three statutory actions to be considered as a unit. 475 U.S. at 369. *See also AIU Ins. Co. v. FMC Corp.*, 51 Cal.3d 807, 799 P.2d 1253, 1270-1271 (Cal. banc 1990). Such claims are, as is typical, excluded from the proposed Consent Decree in this case.

In the year following the *NEPACCO* decision, there came before this Court the case of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). In *Union Gas*, the United States sought recovery of response and cleanup costs from Union Gas in connection with the nation's first emergency superfund site. Union Gas filed a third-party complaint against the State of Pennsylvania alleging that it was responsible for at least a portion of the cost because it was an owner or operator of the hazardous waste site within the meaning of §107(a). The District Court dismissed the complaint holding that the Eleventh Amendment barred suit against the state.

Justice Brennan, speaking for a majority of the Court on the statutory interpretation issue, stated that the case presented the question of whether CERCLA and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Public Law No. 99-499, 100 Stat. 1613:

> *permits a suit for monetary damages against a state in federal court* and, if so, whether Congress has the authority to create such a cause of action when legislating pursuant to the Commerce Clause. The answer to both questions is 'yes.'

491 U.S. at 5 (emphasis added).

The plurality began its analysis by noting that the Court first had to determine whether CERCLA and SARA clearly expressed "an intent to hold states liable *in damages* for conduct described in the statute." 491 U.S. at 7 (emphasis added). The Court pointed out that CERCLA provided both a mechanism for cleaning up hazardous waste sites and imposed the cost of cleanup upon those responsible for the contamination. The court said that §107(a) "*provides for liability in damages, and liability in damages* is considered a special remedy requiring special statutory language, only where the state's immunity from suits by private citizens is involved." 491 U.S. at 12 (emphasis

added). The opinion further noted that it would be very peculiar to interpret the statute, given its definitional provisions, to signal that only the United States, rather than private citizens, could sue the states for "*damages* under CERCLA." 491 U.S. at 12 (emphasis added). Finally, the plurality concluded that "the language of CERCLA as amended by SARA clearly evinces an intent to hold states *liable in damages* in federal court." 491 U.S. at 13 (emphasis added).

Justice Brennan went on to say: "Our conclusion that CERCLA *clearly permits suits for money damages against states* in federal court requires us to decide whether the Commerce Clause grants Congress the power to enact such a statute." 491 U.S. at 13 (emphasis added). A plurality of the Court concluded that the Commerce Clause did authorize Congress to override the state's immunity when legislating under the power conferred by that clause. The plurality further stated that congressional power under the Commerce Clause would be incomplete "without the authority to render states *liable in damages*." 491 U.S. at 19 (emphasis added). The opinion further said that a CERCLA case "brilliantly illuminates" the point that "*only money damages* . . . will carry out Congress' legitimate objectives under the Commerce Clause" in dealing with the problems in environmental harm. 491 U.S. at 20 (emphasis added). Justice Brennan said that " we must often look to the federal government for environmental solutions. And often these solutions, to be satisfactory, must include *a cause of action for money damages*." 491 U.S. at 21 (emphasis added).

Justice Brennan summarized the decision of the Court in stating: "We hold that CERCLA renders states *liable in money damages* in federal court and that Congress has the authority to render them so liable when legislating pursuant to the Commerce Clause." 491 U.S. at 23 (emphasis added).

Justice Scalia's concurring opinion joined with the plurality in holding that CERCLA and SARA "clearly renders states liable

in *money damages* in private suits." 491 U.S. at 29 (emphasis added). The inclusion of states, apparently for all purposes, within the statutory definition of the word "persons," bolstered by other statutory language that assumes state liability is equivalent to the liability of private individuals, "leaves no fair doubt that states are liable to private persons for *money damages*." 491 U.S. at 30 (emphasis added). The concurring opinion, finding that the statute "renders states liable in private suits for *money damages*," 491 U.S. at 30 (emphasis added), then turned to consideration of other Eleventh Amendment issues.

One can hardly come away from a fair reading of the opinions in *Union Gas* without the firm conviction that this Court considered a suit to recover response and cleanup costs under §107(a) of CERCLA as an action for "money damages" authorized by that statute. The Court no less than twenty-one times referred to such a suit as one for "monetary damages," "money damages," "liability in damages" or "damages."[9] In common legal parlance, an action for "money damages" denotes an action at law rather than one in equity. Indeed, the fact that the Plaintiff's complaint can be redressed by the payment of money rather than some other kind of relief is traditionally *the* distinctive difference between law and equity.

The conclusion that the "money damages" sought for response and cleanup costs constitutes a legal rather than equitable claim is bolstered by the fact that the Court considered an Eleventh Amendment issue to be presented by the case. If the payment of such sums of money were merely the equivalent of the cost of complying with an injunction, as held by the Eighth Circuit, then no Eleventh Amendment issue would have existed

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[9] The Ninth Circuit has expressly held that §107(a)(4)(B) creates a private cause of action for damages. *Wickland Oil Terminals v. ASARCO*, 792 F.2d 887, 890 (9th Cir. 1986).

in making such a claim against a State. *See, e.g., Milliken v. Bradley*, 433 U.S. 267 (1977).

An essential underpinning of the *NEPACCO* decision, endorsed by the Eighth Circuit in the decision below, is that response and cleanup costs incurred by the state and federal governments which form the basis for the claim against Citizens Electric are "equitable monetary relief" under CERCLA. The Eighth Circuit concluded that the millions of dollars sought from insureds was an "equitable" rather than "legal" claim because the government was seeking the cost of restoring the property to its former condition, which the Court below characterized as the equitable remedy of restitution.[10] The Eighth Circuit's holding that "restitution" is always and in every case an equitable remedy cannot withstand analysis.

In the first place, this is not a case where Citizens Electric has been ordered to pay back ill-gotten gains. It has received no money from the United States, the State of Missouri or the property owner. Rather, the governmental plaintiffs are seeking the recovery of response and cleanup costs which they have spent on the site and which are necessary to clean it up. While the cost of restoration is the measure of the damages sought, it is in no way "restitution" in the sense of requiring Citizens Electric "to disgorge funds wrongfully withheld" from anyone. *Cf. Curtis v. Loether*, 415 U.S. 189, 197 (1974).

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[10] In *Exxon Corp. v. Hunt*, 475 U.S. 355, 375-376 (1986), the Court said that CERCLA did not create a cause of action to compensate third parties for damages resulting from hazardous waste discharge. Such claims, for example by neighboring property owners, are left to state law. Under Missouri law, claims by third parties for property damage are tried to juries and, depending upon the facts of the particular case, the measure of damages may be the cost of restoring the property to its former condition. *See, e.g., Jack L. Baker Cos. v. Pasley Mfg. & Dist. Co.*, 413 S.W.2d 268 (Mo. 1967); *Missouri Approved Jury Instructions* §4.02, Notes On Use (4th ed. 1991).

Moreover, the Eighth Circuit's invocation of "restitution" as an exclusively equitable remedy is supported neither by recent case law nor the historical antecedents of the doctrine. Most cases which have rejected a contention that cost recovery claims are legal rather than equitable rely upon two decisions of this Court: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). However, neither case compels the conclusion that cost recovery actions present equitable issues.

Porter involved the power of a federal court to grant monetary relief in an enforcement proceeding under §205(a) of the Emergency Price Control Act of 1942. In *Porter*, a landlord had demanded and received rents in excess of the lawful maximum. Although the time for recovery of the excess rents by the tenants had expired, the United States nevertheless sought an injunction restraining future overcharges and requiring the landlord to return to the tenants the excess rents collected. This Court reversed the lower court's holding that there was no jurisdiction to order restitution, holding that remedy was within the broad grant of the equitable powers contained within the statute. 328 U.S. at 397-400. The Court distinguished the restitutionary remedy under §205(a) sought by the United States from the damage remedy under §205(e) available to the tenants, by noting that the United States had asked the Court to "act in the public interest by restoring the status quo and ordering return of that which rightfully belongs to the purchaser or tenant." 328 U.S. at 402.

Porter is simply not applicable to the cost recovery action. A party in the position of Citizens Electric has not received money from a third party as a result of its conduct. Rather, the plaintiff is seeking to recover from Citizens Electric sums of money necessary to investigate and clean up the hazardous waste site. The fact that the money is used to restore the property to its former condition and that the measure of the cost recovery action

is the amount of that cost (thus returning both the property and the government to their pre-injury status) does not make the claim an equitable one. If merely restoring a party to his pre-injury status were the test, then there would be very little left in the realm of legal compensatory damages.

In *Wyandotte*, the United States sought to recover the costs incurred in removing a negligently sunk vessel. The vessel owner refused to pay, arguing that the exclusive remedy of the United States under §19 of the Rivers and Harbors Act of 1899, 33 U.S.C. §414, was to raise the vessel and sell it upon removal. The Court disagreed, implying a cause of action to the recovery of costs. Citing the *Restatement of Restitution* §115, the Court held that the United States could recover the costs of removal of the vessel from the party who negligently sank it. The Court never said whether the cause of action was legal or equitable, although the Court of Appeals in ruling in favor of the government had characterized its claim as one for damages. *United States v. Cargill, Inc.*, 367 F.2d 971, 979 (5th Cir. 1966).

The Eighth Circuit's assumption that restitution is exclusively an equitable remedy ignores its history. In fact, the jurisdiction of the law courts and the equity courts have always overlapped with respect to restitution. Much of the relief which we now think of as restitutionary was available in the English common law courts in an action of assumpsit. *Restatement of Restitution*, Introductory Note at 5-7, 9-10 (1937). The idea of unjust enrichment is the connecting link between the legal and equitable theories of restitution. Nevertheless, it is inaccurate to characterize restitution as simply an equitable remedy. The author of the authoritative treatise on restitution points out the principal remedy at law under the doctrine is "quasi-contract" leading to a money judgment. 1 George E. Palmer, *Law of Restitution* §1.2, pp. 6-9. Although quasi-contract is sometimes referred to as an equitable remedy, "it is clear that the action is at law and the relief given is simply a money judgment." 1

Palmer §1.2 at 9. Indeed, the *Restatement of Restitution* §4(f) recognizes that one of the remedies appropriate to restitution is "a judgment at law or a decree in equity for the payment of money."

C. The Decision Below Raises An Important Issue Of Federal Law Which If Resolved By This Court, Because It Is Inextricably Intertwined With State Law Contractual Issues, Would Reduce Litigation Over Insurance Coverage, Discourage Forum Shopping And Encourage The Use Of Limited Financial Resources To Pay For Actually Cleaning Up Hazardous Waste Sites

Cleaning up hazardous waste sites is an enormous public health problem facing society today. As of 1991, there are approximately 1,200 sites on the National Priority List - a list of sites compiled by the EPA as the ones most hazardous to the human health and the environment. There are another 14,000 sites which have yet to be assessed for inclusion on the NPL.

The effort to clean up hazardous wastes presents enormously complex public health, scientific and engineering issues as to the most effective methods of addressing the problem. Inevitably, they also present the question who will pay the bill for the cost of determining and implementing the solutions. The question of costs - alas, also inevitably - carries with it the overarching and very practical legal issue facing all the litigants in CERCLA actions, including the government, property owners, PRPs and insurance companies: How should the massive costs be allocated among the responsible parties?

CERCLA is, of course, a liability-based statute. Congress determined that the cost of cleaning up hazardous waste sites is to be apportioned on the basis of strict liability, joint and several liability, and retroactive liability. Given the fact that legal liability is the basis for imposing these costs on PRPs, it was only

natural that they would look to their liability insurers pay some or all of that liability and the costs of defense in the litigation to determine the amount due. Large companies may be able to pay the CERCLA liabilities on either a self-insured basis or to absorb relatively high deductibles under their insurance policies, thus obviating the necessity to make claims. Medium and small companies, on the other hand, may face financial devastation - even bankruptcy - by a single CERCLA claim.

The key to determining whether there is coverage under any liability insurance policy is the nature of the claim. The myriad of conflicting decisions arising out of determinations of state law with respect to interpretations of the contractual language in CGL policies is due to the failure of the courts below to focus on the nature of the claim made against the insurers. If the claims are, as contended by the petitioner, legal claims for money damages, then under any interpretation of the contractual language of CGL policies there is coverage for such claims.

The wastefulness of continued extensive litigation over this very basic issue has recently been highlighted by study performed under the auspices of the RAND Corporation's Institute for Civil Justice. J.P. Acton and L.S. Dixon, *Superfund and Transaction Costs: The Experience of Insurers and Very Large Industrial Firms* (1992). This study estimated that in 1989, for example, CGL insurance companies spent approximately $470,000,000 on hazardous waste site claims. *Id.* at 31. Of this total, 88%, or $410,000,000, was spent on transaction costs compared to 30% on other types of claims. *Id.* at 26, 29, 31. More than half of the 1989 transaction costs, $200,000,000, was estimated to have been spent on coverage disputes. *Id.* at 31. Thus, 42% of the total expenditures in 1989 by insurance companies on hazardous waste sites went to pay for the cost of determining whether the company had any obligations to honor under their policies. *Id.* at 32. This figure, of course, does not

include the cost incurred by insureds in either defending or prosecuting coverage disputes.

The 1989 experience was not atypical. In fact, the RAND study showed that insurers consistently spent more than three times as much money contesting coverage than on paying the costs of clean up from 1986 to 1989. *Id.* at 20, 23. For example, the four insurance companies which were the specific subjects of the study spent $20,761,000 on coverage disputes during 1986-1989, but only $6,013,000 in indemnity payments. *Id.* at 20. The average cost of the coverage disputes was $184,000, ranging from an average of $52,000 to $400,000 per case among the companies studied. *Id.* at 25. Only about 1 in 6 coverage cases have been closed. *Id.* Thus, "a vast majority of coverage cases are still pending and incurring costs." *Id.*

The variation in decisions among the courts has encouraged this trend. Indeed, the lack of uniformity in court decisions has fostered the grossest kind of forum shopping and preemptive filings. *See e.g.* D. Davis, "Insureds Versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena - a Losing Battle for Both Sides," 43 *Southwestern* L.J. 969, 994-995 (1990). Indeed, there is a striking lack of uniformity even in cases which purport to interpret identical policy language under the same state's law.

For example, as a result of the *NEPACCO* decision and the decision of the District of Columbia Circuit in *Independent Petrochemical v. Aetna Casualty & Surety Co., supra*, the question of insurance coverage for environmental clean-up costs in Missouri is not answered by any principled application of the law, but by the mere fortuity of who wins the race to the court house. It is not beyond the realm of possibility to have a situation where a single insurance company could have issued CGL policies to two different insureds involved in the same hazardous waste site, but to have conflicting court decisions from different

jurisdictions deciding that the insurance company is liable to one company but not the other.

Such a scenario seems much less far-fetched in light of the unresolved conflict between *NEPACCO* and *Independent Petrochemical* where two federal courts reached different conclusions under Missouri law as to identical policy language for different insurers who were involved in the same Superfund sites. The result of these conflicts is the question of whether insurance coverage exists to pay response and clean-up cost at a hazardous waste site in Missouri now depends not upon the state of what happens *in* the court house but the State the court house happens to be *in*. The issue has been dropped squarely in the lap of federal courts primarily because most of the large CGL insurers have issued policies in numerous states, making diversity the basis for jurisdiction. Once the insurers obtain a favorable decision in federal courts such as the Eighth Circuit, they frequently go to extraordinary lengths to make sure that future coverage cases are decided there, rather than in state courts which might disagree with the federal court's prediction of how they would rule.

A decision by this Court which sets forth a uniform national rule as to whether a cause of action for the recovery of response, clean-up, remedial, and removal costs is "legal" or "equitable" could resolve such irreconcilable conflicts. A decision that a complaint under §107 seeks "legal" relief would go far to assure the uniformity of coverage decisions, to reduce litigation costs spent on insurance coverage disputes and to insure that a greater proportion of insurance money will be spent on actually cleaning up a site rather than paying attorneys to quarrel over who will pick up the bill. We do not suggest of course, that all coverage litigation will cease if the Court determines that actions under §107(a) are legal rather than equitable. However, once this threshold issue is authoritatively decided, then the remaining

contractual issues which implicate state law or mere factual disputes will be all that remain for the grist of the judicial mill.[11]

The Court does not decide state law contractual questions involved in insurance coverage disputes even though the federal circuits may be split on the issue. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). However, this Court has the power to decide authoritatively and definitively the underlying federal question: Whether a cause of action for the recovery of response, remedial, removal and clean-up costs under §107(a) is "legal" or "equitable." A decision by the Court on that issue will have a significant effect upon whether parties continue to spend millions on coverage disputes or instead channel their efforts and financial resources towards cleaning up the environment.

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[11] In 1973 insurers began issuing new CGL policies which contained an exclusion for releases of toxic or hazardous substances, except where the release was "sudden and accidental." This so-called "pollution exclusion" clause is in the USF&G policies issued to Citizens Electric after 1973. App. C. at A-7. The Eighth Circuit, in its latest decision on environmental insurance issues under Missouri law, held that the "sudden and accidental" exception to the pollution exclusion clause does not come into play where the release occurs over a period of time. *Aetna Casualty & Surety Co. v. General Dynamics Corp.*, __ F.2d __, 1992 WL 150933 (8th Cir., July 6, 1992) at 2-3. *But see Downey v. Kansas City Gas Co.*, 338 Mo. 803, 92 S.W.2d 580, 587 (1936) (gradual infection developed over time was "sudden" and "accidental" within meaning of worker's compensation statute). The Eighth Circuit also re-affirmed its holding in *NEPACCO* that §107(a) claims were equitable actions for restitutionary relief. 1992 WL 150933 at 5.

In this case, the parties stipulated that the only issue was the coverage question relating to the "damages" language in the policies and that "No other questions arising out of USF&G's denial of coverage . . . are presented and, therefore, are deemed waived by the parties." Stipulation of Facts, ¶ 26. Even if the application of the pollution exclusion clause remained an issue, Citizen Electric's evidence would be that the PCB-contaminated oil was not released gradually but spilled as a result of the negligence of the property owner's employees. Thus, the releases would be "sudden and accidental" even under the Eighth Circuit's restrictive interpretation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and the opinion of the Eighth Circuit.

Respectfully submitted,

* James W. Erwin
John C. Hannegan
Crystal M. Kennedy
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Petitioner
Citizens Electric

* Counsel of Record

August 1992

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2834EM

United States Fidelity and Guaranty Company,
Appellee,

v.

Citizens Electric Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.
[UNPUBLISHED]

Submitted: March 9, 1992
Filed: March 20, 1992

Before FAGG and BEAM, Circuit Judges, and GAITAN,* District Judge.

PER CURIAM.

From 1953 to 1976, Citizens Electric Company (Citizens) sent oil-filled electrical transformers to Missouri Electric Works, Inc. (MEW) for repair or resale. During part of this time, United States Fidelity and Guaranty Company (USF&G) insured Citizens under general and excess liability policies. After the Environmental Protection Agency (EPA) notified Citizens of its potential responsibility for costs of cleaning up MEW's property, USF&G brought this action seeking a declaratory judgment that it has no duty to defend or indemnify Citizens on the EPA's claim. Citizens counterclaimed for declaratory relief and dam-

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* The HONORABLE FERNANDO J. GAITAN, JR., United States District Judge for the Western District of Missouri, sitting by designation.

ages for breach of contract. The sole question before the district court was whether clean-up costs are "damages" under USF&G's policies. This is a question of Missouri law. *See Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir.) (en banc) (*NEPACCO*), *cert. denied*, 488 U.S. 821 (1988).

Relying on our divided decision in *NEPACCO*, the district court held clean-up costs are not covered damages. *Se id.* at 987. Citizens contends we should overrule *NEPACCO* and reverse the district court because *NEPACCO* is inconsistent with Missouri law and other courts hold clean-up costs are covered damages. *See, e.g., Independent Petrochem. Corp. v Aetna Cas. & Sur. Co.*, 944 F.2d 940, 946-47 (D.C. Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3553 (U.S. Jan. 3, 1992) (No. 91-1252). LIke the district court, however, we must follow *NEPACCO* until it is overruled by our court banc, *Grisham v. Commercial Union INs. Co.*, 951 F.2d 872, 875 (8th Cir. 1991), or a Missouri appellate court "conclude[s] that we have misinterpreted [Missouri] law," *Parker Solvents Co. v. Royal Ins. Cos.*, 950 F.2d 571, 572 (8th Cir. 1991). Citizens contends *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 393-94 (Mo. Ct. App. 1990) "is powerful evidence" our en banc court misread Missouri law. We cannot say *Hyatt* makes *NEPACCO*'s interpretation of Missouri law clearly wrong, however. Without mentioning *NEPACCO* or environmental clean-up costs, *Hyatt* addresses only whether sums paid as attorney's fees are covered damages. Thus, the district court correctly ruled in favor of USF&G.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2834EMSL

United States Fidelity and Guaranty Company,
Appellee,

v.

Citizens Electric Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 20, 1991

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

MANDATE ISSUED 5/18/92

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-350C(7)

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Plaintiff,
vs.
CITIZENS ELECTRIC COMPANY,
Defendant.

MEMORANDUM AND ORDER

[Filed: June 28, 1991]

Plaintiff United States Fidelity & Guaranty Company (hereinafter USF&G) and defendant/counterclaim plaintiff Citizens Electric Corporation (hereinafter Citizens Electric) have filed trial briefs and a joint stipulation of facts. Plaintiff USF&G seeks a declaratory judgment that it has no duty to defend or indemnify Citizens Electric as a potentially responsible party under CERCLA, 42 U.S.C. §9601, *et seq.*, for the cleanup and remediation of PCB contamination at the Missouri Electric Works site in Cape Girardeau, Missouri. Citizens Electric, by counterclaim, seeks a declaration that the costs it has incurred and will incur with respect to investigation and remediation at the Missouri Electric Works site and the defense of the claim brought against it by EPA are covered by the primary and excess policies of insurance issued to it by USF&G. In addition USF&G seeks damages for breach of contract. The parties stipulate that the only issue before this Court is "whether the costs and expenses which Citizens Electric has incurred and will incur in the future for the Missouri Electric site are sums which

Citizens Electric shall be legally obligated to pay as damages because of property damage caused by an occurrence." (¶ 26 Joint Stipulation).

In June of 1987 the EPA notified Citizens Electric that Citizens Electric was considered a potentially responsible party as defined under CERCLA for costs of investigation, project planning, and cleanup of polychoinated biphenyl (hereinafter PCB) contamination at the Missouri Electric site. (¶ 3 Joint Stipulation). The Environmental Protection Agency alleges that Citizens Electric sent oil-filled electric equipment to the Missouri Electric site from 1953 through 1976. (¶ 4 Joint Stipulation). In December, 1988, Citizens Electric and other named potentially responsible parties entered into an Administrative Order on Consent. Under the terms of the Order on Consent, Citizens Electric was required to conduct a remedial investigation and a feasibility study of the PCB contamination at the Missouri Electric site. (¶ 6 Joint Stipulation). The studies were completed in July, 1990. (¶ 7 Joint Stipulation). In September, 1990, EPA issued its Record of Decision. The estimated cost of the remedial action will be $8.4 million for soil remediation measures and $773,000 for ground water remediation measures. (¶ 8 Joint Stipulation).

From January of 1968 through November of 1972 and November of 1973 through November of 1983, USF&G insured Citizens Electric under its standard-form comprehensive general liability policy (hereinafter CGL).[1] (¶ 9 Joint Stipulation).

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[1] At least fourteen separate general liability policies and thirteen excess policies covered the period in question. (¶¶ 14, 15 Joint Stipulation). The parties have stipulated that the standard insuring agreement and standard definitions set forth in Exhibit 10 reflect the coverage terms from November of 1968 to November of 1972. (¶ 18 Joint Stipulation). Exhibit 31 reflects the coverage terms from November of 1973 to November of 1976. (¶ 19 Joint Stipulation). Policy R1CC824421 (Exhibit 10) reflects the coverage terms

(Footnote 1 continued on next page)

USF&G insured Citizens Electric under excess policies of liability insurance from October of 1969 through November of 1982.[2] (¶ 10 Joint Stipulation). After notice of the EPA claim, USF&G responded with a reservation of rights pending completion of its investigation. (¶¶ 11, 12 Joint Stipulation). On December 7, 1989, USF&G denied coverage of the claim. (¶ 13 Joint Stipulation).

All of the general liability coverage policies contain the same coverage provision. That provision reads in pertinent part:

> Coverage B — Property Damage Liability
>
> The Company will pay on behalf of the *Insured* all sums which the *Insured* shall become legally obligated to pay as *damages* because of
>
> A. *bodily injury* or
>
> B. *property damage*
>
> to which this insurance applies, caused by an *occurrence*, and the Company shall have the right and duty to defend any suit against the *Insured* seeking *damages* on account of such *bodily injury* or *property damage*, even if any of the

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(Footnote 1 continued)

from November of 1976 through November of 1979. (¶ 20 Joint Stipulation). Beginning during 1979, USF&G began using a revised CGL insurance form. The parties stipulate that the insuring agreement and standard definitions in Exhibit 10 reflect the coverage terms from November of 1979 through November of 1983. (¶ 21 Joint Stipulation).

[2] The parties stipulate that the standard insuring agreement and standard definitions set forth in Exhibit 32 reflect the coverage terms from October of 1969 through November of 1973. (¶ 2 Joint Stipulation). Exhibit 33 covers the period from November of 1973 through November of 1981. (¶ 23 Joint Stipulation). Exhibit 34 covers the period from November of 1981 through November of 1982. (¶ 24 Joint Stipulation).

> allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

Policies from 1968 through 1972 defined *damages* as "damages . . . for loss of use of property resulting from *property damage*." Later policies did not define the term. The 1968 through 1972 policies defined *occurrence* as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury* or *property damage* neither expected nor intended from the standpoint of the *insured*." Later policies added the words *continuous or repeated* before *exposure*. The 1968 through 1972 policies defined *property damages* as "injury to or destruction of tangible property." Later policies defined *property damage* as

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use caused by an *occurrence* during the policy period.

Policies after 1972 also included pollution exclusions as follows:

> This insurance does not apply . . .
>
> (f) to *bodily injury* or *property damage* arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water; but this exclusion does not apply

> if such discharge, dispersal, release or escape is sudden and accidental.

The coverage provision in the excess policies from 1969 through 1981 provided:

> 3.1 *Coverage*. The Company will indemnify the *Insured* for all sums which the *Insured* shall become obligated to pay as *damages* and *expenses* . . . by reason of liability imposed upon the insured by law, or by contractual liability, because of
>
> (1) *personal injury* or *property damage*, cause by or
>
> (2) advertising liability arising out of an *occurrence* which takes place anywhere.

After 1981, the coverage provision read as follows:

> *Coverage*. The Company will indemnify the *Insured* for all sums which the *Insured* shall become legally obligated to pay as damages because of *bodily injury, personal injury, property damage*, or *advertising injury* to which this policy applies caused by an *occurrence* which takes place anywhere.

The excess policies covering the period 1969 through 1973 defined *property damage* and *occurrence* as the general liability policies defined them from 1968 to 1973. *Damages* is defined in the excess policies as "all sums which the *Insured*, or any company as his Insurer, or both, become legally obligated to pay as damages, whether by reason of adjudication or settlement. . . ." The term *expenses* is defined as "all reasonable expenses incurred by the *Insured* in the investigation, settlement, and defense of any claim or suit seeking such damages. . . ." Policies from 1973 through 1982 added the same pollution exclusion as found in the general liability policies.

In *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, the Eighth Circuit held that the term *damages* is not ambiguous in the insurance context and that the plain meaning of the term *damages* used in CGL policies refers to legal damages and does not cover cleanup costs. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir. 1988), *cert. denied, Missouri v. Continental Ins. Cos.*, 488 U.S. 821 (1988). The Eighth Circuit cited *Robin v. Blue Cross Hospital Service*, 637 S.W.2d 695, 698 (Mo. banc 1982) as the source from the applicable Missouri law. No Missouri case is directly on point, but *Robin* sets out the rules of insurance agreement construction as follows:

> The rules of construction applicable to insurance contracts required that the language used be given its plain meaning. If the language is unambiguous the policy must be enforced according to such language. If the language is ambiguous it will be construed against the insurer. Language is ambiguous if it is reasonably open to different constructions; and language used will be viewed in light of the "meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy."

Robin v. Blue Cross Hospital Service, 637 S.W.2d at 698 (Mo. banc 1982) (citations omitted). The Eighth Circuit, while holding the term *damages* was not ambiguous, stated:

> Viewed outside the insurance context, the term "damages" is ambiguous: it is reasonably open to different constructions. . . . The dictionary definition does not distinguish between legal damages and equitable monetary relief. . . . Thus, from the viewpoint of the lay insured, the term "damages: could reasonable include all monetary claims, whether such claims are described as damages, expenses, costs, or losses.

Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem Co., 842 F.2d at 985. The dissent views this concession as dispositive and notes that, to the extent the word *damages* is open to different constructions, it must be accorded the meaning ordinarily given it by a lay person. *Id.* at 988 (Heaney, J., dissenting). *Robin v. Blue Cross Hospital Service* provides a formula for determining if language is ambiguous. Under that standard a term such as *damages* is ambiguous if it is "reasonably open to different constructions," and that determination must be made "in light of 'the meaning that would ordinarily be understood by the lay [person] who bought and paid for for policy.' " *Robin*, 637 S.W.2d at 698. The majority admits that the lay person would understand the term *damages* to include equitable remedies. Furthermore, the majority recognizes that under Missouri law the cost of restoring property to its original condition is one measure of damages. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d at 987.

Defendants urge this Court to follow the reasoning in *Jones Truck Lines v. Transport Ins. Co.*, No. 88-5723, 1989 WL 49517 (E.D. Pa. May 10, 1989). That court addressed the same issue applying Missouri law and concluded that costs incurred in the investigation and cleanup of hazardous waste sites are covered "damages" under a CGL policy. It specifically recognized the contrary Eighth Circuit holding and stated it would defer to the Eighth Circuit decision unless it found that the Circuit Court ignored clear signals emanating from the state courts or clearly misread state law. The Court in *Jones Truck Lines* concluded that to be consistent with the Eighth Circuit holding in *McMichael v. American Ins. Co.*, 351 F.2d 665, 669 (8th Cir. 1965), the term

damages must be give a meaning ordinarily understood by a layperson.[3]

While the reasoning of the dissent in *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.* and the reasoning of the Federal District Court in Pennsylvania in *Jones Truck Lines v. Transport Ins. Co.* are consistent with the principles of construction of insurance contract terms under Missouri law, this Court is constrained solely by reason of *stare decisis* to follow the majority opinion in *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*

ACCORDINGLY,

IT IS HEREBY ORDERED that JUDGMENT is entered in favor of Plaintiff United States Fidelity & Guaranty Corporation and against Defendant Citizens Electric Corporation.

Dated this 28th day of June, 1991.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

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[3] *See also*, Note, *Jones Truck Lines v. Transport Insurance Co.: More Fuel for the Heated Debate over Insurance Coverage for CERCLA Clean Up Costs*, 35 S.D.L. Rev. 298 (1990). (emphasizing that the Eighth Circuit's reasoning and the *Jones Truck Lines* Court's reasoning conform to each other in most respects while reaching opposite conclusions). This note addresses the distinction made by the Eighth Circuit as follows:

> In the absence of such a distinction in the policy, it is difficult to conceive how a definition of "damages" that is grounded upon the ancient division between law and equity — such as the definition proffered by the Eighth Circuit — could be labeled as the "ordinary and accepted meaning" of "damages" in the eyes of a reasonably prudent layperson.

Id. at §IV. The author reached the conclusion that there was "no basis in Missouri law for the Eighth Circuit's quantum leap into the highly technical realm of insurance terminology." *Id.* at §IV.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-350C(7)

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Plaintiff,

vs.

CITIZENS ELECTRIC COMPANY,
Defendant.

JUDGMENT

[Filed: June 28, 1991]

In accordance with the memorandum June 28, 1991, and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff United States Fidelity and Guaranty Company, shall have judgment against Defendant Citizens Electric Company.

Dated this 28th day of June, 1991.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2834EM/SL

United States Fidelity and Guaranty Company,
Appellee,

vs.

Citizens Electric Company,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge John R. Gibson, Judge Fagg, Judge Beam, and Judge Hansen would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

May 7, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit